

Issue: Access to the Grievance Procedure; Ruling Date: March 2, 2010; Ruling #2010-2503; Agency: Virginia Department of Transportation; Outcome: Access Granted.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ACCESS RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2010-2503
March 2, 2010

The grievant has requested a ruling on whether she had access to the grievance procedure when she delivered a grievance to the Department of Transportation (the agency) on November 23, 2009. For the reasons set forth below, this Department concludes that the grievant has access to the grievance procedure and this grievance must be allowed to proceed, at least through the management resolution steps.

FACTS

This case involves the elimination of the grievant's position by the agency and her eventual separation. Once notified that her position would be eliminated, the grievant was given a choice by the agency either to accept layoff with severance benefits or to ask that the agency consider placing her in a different position. The grievant completed the agency's Affected Employee Placement Interest Form, choosing the latter option. Language included on this form indicated that if the grievant declined an offer of placement into a position that does not require relocation or a reduction in salary, the grievant would be separated and treated as if she had voluntarily resigned.

As required by the Affected Employee Placement Interest Form, the grievant also submitted a completed application for employment, which required her to indicate the shift she would accept (day, evening, night, rotating, or weekends). Of those choices, the grievant checked only "day." On or about October 13, 2009,¹ the grievant was offered a position that required her to work evening hours (although it did not involve a relocation or a salary reduction). Because she was offered a position with evening hours, which she had previously indicated to the agency on the required application form that she would not accept, the grievant declined the offer of placement on or about October 15, 2009. The grievant states she was required to inform the agency of her decision within twenty-four hours.

¹ The grievant states she was informed of the agency's placement offer on October 14, 2009.

Because the grievant declined placement, she was separated from employment on or about October 24, 2009. The grievant initiated her grievance on November 23, 2009. The agency administratively closed the grievance, asserting that the grievant did not have access to the grievance procedure because her separation was treated as a voluntary resignation. The grievant has now appealed that determination to this Department.

DISCUSSION

To have access to the grievance procedure, an employee “must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or involuntary separation).”² Thus, after an employee separates from state employment, the only claim for which he or she may have access to the grievance procedure to file a grievance is a challenge to a termination or an involuntary separation. In this case, the grievant asserts she was involuntarily terminated. The agency, however, asserts that the grievant’s act of declining the offer of placement was a voluntary resignation.

This case presents unusual facts. Typically, when an employee is separated by layoff, the grievant has access to the grievance procedure and may timely grieve that separation, at least through the management steps, within 30 calendar days following the actual date of separation.³ However, in this case, the agency’s Placement Interest Form clearly communicated to employees that refusing an offer of placement that did not require relocation or a reduction in salary would be considered a voluntary resignation. Indeed, policy states that an employee who declines such an offer of placement receives no severance benefits,⁴ thus there is little difference between an actual voluntary resignation and the constructive resignation contemplated by the Placement Interest Form. However, state policy also indicates that an employee who declines such a placement is coded as “separated-layoff,”⁵ which is listed as a different type of separation than a “resignation” in Department of Human Resource Management (DHRM) Policy 1.70.⁶ As such, there is some justification for the position that for purposes of access to the grievance procedure, an employee’s separation following her refusal of an offer of placement should not be considered a voluntary resignation.

Indeed, here it is difficult to find that the grievant’s separation was completely “voluntary.” The grievant at no time conveyed her desire to leave employment.⁷ In addition, the grievant’s conduct appears consistent with someone who wished to remain employed, just during

² *Grievance Procedure Manual* § 2.3. In addition, the employee must satisfy the other requirements for access to the grievance procedure, such as non-probationary status. *Id.*

³ *See, e.g.*, EDR Ruling No. 2008-1814. A grievance challenging layoff does not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether the agency misapplied or unfairly applied policy, or discrimination, retaliation or discipline improperly influenced the decision. Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1.

⁴ DHRM Policy 1.30, *Layoff*.

⁵ *Id.*

⁶ DHRM Policy 1.70, *Termination/Separation From State Service*.

⁷ This fact also makes this case different from a “resign or be fired” situation as addressed in prior EDR rulings. *See, e.g.*, EDR Ruling No. 2008-1902. In those cases, the employee had submitted an actual resignation rather than the constructive resignation at issue here.

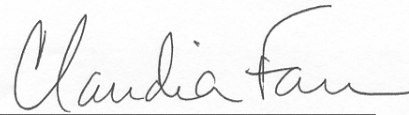
the day shift she had previously worked and had informed the agency she would accept. Given that the agency had asked employees to submit an application for employment with their Placement Interest Form, it was reasonable for the grievant to assume that information on that application would be taken into account, and that the agency would not offer her a position for an evening shift knowing that she would accept only a day shift position.

Based on the particular facts of this case, we cannot conclude that the grievant's separation from state service was voluntary for purposes of access to the grievance procedure. Although the grievant had been advised that declining an offer of placement to a position that did not require relocation or a reduction in salary would be treated as a voluntary resignation, going into that process, she did not know or have reason to believe that the agency would offer her placement in a position with a shift for which her application clearly stated she would not accept.

It should be noted, however, that this ruling only determines that the grievant's separation shall be treated as involuntary for access purposes under the grievance procedure. This ruling in no way determines that anything the agency has done violated policy or was otherwise improper in its handling of the grievant's separation. Indeed, at this early stage, it is unclear that the agency's process was flawed in any way under policy. Further, this ruling does not address any other procedural concerns with this grievance other than the issue of access.⁸

CONCLUSION

The grievant had access to the grievance procedure to challenge her separation from employment when she initiated this grievance on November 23, 2009. The agency has **five workdays from receipt of this ruling** to return the grievance to the appropriate member of management for scheduling of the second step meeting.



Claudia T. Farr
Director

⁸ The grievant also argued that an e-mail challenging the agency's decision was, in effect, her initiation of a grievance on October 19, 2009, prior to her separation. Because this Department has determined that the grievant had access to the grievance procedure when she initiated her grievance on November 23, 2009, this point need not be addressed. However, such an e-mail is not a grievance because it was not on the Grievance Form A. *Grievance Procedure Manual* § 2.4 ("An employee must initiate a grievance on a fully completed 'Form A.'").